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E-FILED on 03/31/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION
NOT FOR PUBLICATION

REHAN SHEIKH,

No. C-07-00262 RMW

Plaintiff,

ORDER GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION

v.

CISCO SYSTEMS, INC., and DOES 1-20

[Re Docket No. 45]

Defendants.

Defendant Cisco Systems, Inc. ("Cisco") moves to compel arbitration of plaintiff Rehan Sheikh's ("Sheikh") claims. By its motion, Cisco seeks to stay the present action pending the conclusion of the arbitration. Plaintiff has filed no written opposition. For the reasons set forth below, the court grants the defendant's motion to compel arbitration. Judicial action in this case shall be stayed pending resolution of the arbitration.

I. BACKGROUND**A. Agreement to Arbitrate**

Sheikh worked for Cisco from September 25, 2000 to November 4, 2005. Decl. of Shannon Thorne ("Thorne Decl.") ¶ 2. On April 2, 2000, Sheikh signed the first of two offer letters in which

1 he acknowledged his employment with the defendant was contingent upon his signing and returning
 2 the offer letter with an Agreement to Arbitrate Employment Disputes ("AAED") document. Thorne
 3 Decl. ¶ 2, Exs. A & C. On the same day, Sheikh also signed the document titled Agreement to
 4 Arbitrate Employment Disputes ("April 2000 Agreement"). Thorne Decl. ¶ 3, Ex. B.

5 The April 2, 2000 offer letter signed by the plaintiff states:

6 This offer is contingent upon . . . your completing, signing and returning to us, both the
 7 enclosed offer of this letter and the . . . Agreement to Arbitrate Employment Disputes. You
 8 need to return the signed documents in the enclosed envelope prior to your date of hire.
 Your employment and start date are contingent upon our receipt of these documents.

9 Thorne Decl., Ex. A at 2, ¶ 3. On the offer letter, Sheikh wrote an anticipated state date of June
 10 2000. *Id.* at 3. The letter requests Sheikh return the signed letter by April 4, 2000. *Id.* at 2, ¶ 7.

11 The Agreement to Arbitrate Employment Disputes document signed by Shiekh on the same
 12 day begins by stating:

13 I agree that any existing or future dispute or controversy arising out of my employment with
 14 Cisco Systems, Inc. (the "Company") or the termination thereof shall be resolved by final
 and binding arbitration in accordance with the rules and regulations of the American
 Arbitration Association.

15 Thorne Decl., Ex. B at 1, ¶ 1. The agreement provides that the laws of the State of California should
 16 govern, that the parties are responsible for their own attorneys' fees, and that the arbitrator does not
 17 have the authority to award attorneys' fees unless a statute authorizes an award to the prevailing
 18 party. *Id.* at 2, ¶ 7.

19 The agreement to arbitrate covers "all disputes and claims arising from and relating to my
 20 employment with the Company . . ." *Id.* at 1, ¶ 2. The following claims, however, are excluded
 21 from arbitration:

22 (1) claims for benefits under workers' compensation, unemployment insurance and state
 23 disability insurance laws;
 24 (2) claims concerning the validity, infringement or enforceability of any trade secret, patent
 right, copyright, trademark, or any other intellectual property held or sought by the Company
 or which the Company could otherwise seek; and
 25 (3) any other claim in which there has been a final decision by the California Supreme Court
 or Ninth Circuit Court of Appeals holding that the claim in question cannot be subject to
 26 final and binding arbitration.

27 *Id.* at 1-2.

1 Cisco further maintains a written arbitration policy, along with other employee policies and
2 guidelines, on the company's intranet. Thorne Decl. ¶ 5. From the intranet, employees can access
3 the document, last modified May 23, 2005, titled Agreement to Arbitrate Employment Disputes
4 ("May 2005 Agreement"). *Id.*, Ex. D. The May 2005 agreement differs only slightly from the April
5 2000 Agreement, and in no material legal respect.

6 **B. Procedural History**

7 The original complaint in this dispute was filed in March 2006 in state court, Superior Court
8 of California, County of Santa Clara. Order Denying Pl.'s Second Mot. to Remand at 2. In January
9 2007, Cisco successfully removed the action to federal court on the basis the plaintiff's claims are
10 preempted by the Employee Retirement Income Security Act ("ERISA"). *Id.* at 3. The court found
11 that some of Sheikh's claims revolved around allegations of Cisco's handling of benefits of claims.
12 *Id.* Sheikh unsuccessfully sought reconsideration. *Id.* After filing a Second Amended
13 Complaint modifying his claims, the plaintiff was again unsuccessful in remanding the action to
14 state court. *Id.*

15 The present motion to compel arbitration was filed April 7, 2008. Sheikh refused Cisco's
16 request to submit his claims to arbitration. Mot. at 1:28-2:1. Cisco now moves to compel arbitration
17 and to stay the present action until the conclusion of arbitration. After hearing oral arguments on
18 Oct. 10, 2008, the court requested parties submit additional briefing on whether the arbitrations
19 agreement is unconscionable.

20 **II. ANALYSIS**

21 The Federal Arbitration Act ("FAA") provides that arbitration agreements generally "shall be
22 valid, irrevocable, and enforceable." 9 U.S.C. § 2. However, courts may decline to enforce such
23 agreements for "grounds as exist at law or in equity for the revocation of any contract." *Id.*;
24 *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002). In determining the
25 validity of an agreement to arbitrate, federal courts apply ordinary state-law principles that govern
26 contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "Thus, generally
27 applicable defenses, such as fraud, duress, or unconscionability, may be applied to invalidate
28

1 arbitration agreements without contravening § 2 [of the FAA]." *Doctor's Assocs., Inc. v. Casarotto*,
2 517 U.S. 681, 687 (1996).

3 **A. The April 2000 Agreement Controls**

4 The court first considers which agreement controls, the April 2000 Agreement or the May
5 2005 Agreement. While Sheikh admits to signing the April 2000 Agreement, Cisco does not submit
6 similar evidence that Sheikh consented to the May 2005 Agreement. Instead, Cisco only alleges that
7 Sheikh had access to the May 2005 Agreement via the company's intranet. Additional evidence of
8 Sheikh's consent is required to supercede the April 2000 Agreement.¹ Thus, the court determines
9 that Sheikh only consented to the initial arbitration agreement and applies its analysis to the April
10 2000 Agreement. That agreement also provides that the law of California governs its interpretation,
11 and the court agrees.

12 **B. Applicable Scope of the Agreement**

13 Sheikh's claims under the California Fair Employment and Housing Act ("FEHA") (claims 1-
14 4) fall within the arbitration agreements inclusion of claims for "discrimination under any and all
15 state and federal statutes that prohibit discrimination in employment." His claims for wrongful
16 termination, intentional infliction of emotional distress, and negligent misrepresentation (claims 5, 6,
17 and 9) are also explicitly included in the agreement. Thorne Decl., Ex. B at 1.

18 Claim 7 alleges the defendant breached contractual agreements in part by "failing to ensure
19 cooperation with the insurance companies to have benefits paid[.]" Second Amended Complaint ¶
20 50. Claim 8 alleges the defendant acted in bad faith and interfered with the payment of benefits to
21 the plaintiff from worker's compensation, medical reimbursements, short term disability, and long
22 term disability insurance plans. *Id.* ¶ 56. Claims 7 and 8, although dealing with benefits and
23 insurance, are at bottom contractual disputes. Claim 7 is for breach of contract and claim 8 for
24 breach of an implied contractual covenant. Neither claim falls within the agreement's stated
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27 ¹ Additionally, the April 2000 Agreement states under the section "Complete Agreement" that
28 it "may be modified only in writing, expressly referencing this Agreement and [the employee] by
full
name, and signed by the President of the Company." Thorne Decl., Ex. B at 3,72. Cisco presents
no evidence to suggest the April 2000 Agreement was modified in accordance with this requirement.

1 exceptions. Accordingly, the court finds that the arbitration agreement includes all of Sheikh's
2 claims.

3 **C. Minimum Requirements for Arbitration of Unwaivable Statutory Claims**

4 In *Armendariz v. Foundation Health Psychcare Servs., Inc.*, the California Supreme Court
5 held that arbitration agreements that cover unwaivable statutory rights enacted for public purpose
6 are subject to particular scrutiny. 24 Cal.4th 83, 100 (2000)(citing Cal. Civ. Code §§ 1668, 3513).
7 Since California courts have held that the California FEHA establishes public rights, Sheikh's FEHA
8 claims must pass this initial analysis. *See Id.*

9 There are five minimum requirements for lawful arbitration of statutory rights in claims
10 arising out of an employment context. *Id.* at 102; *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.
11 4th 638, 653-54 (2004). At a minimum, an arbitration agreement must: (1) provide for neutral
12 arbitrators, (2) provide for more than minimal discovery, (3) require a written award, (4) provide for
13 all types of relief that would otherwise be available in court, and (5) not require the employee to pay
14 either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the
15 arbitration forum. *Armendariz*, 24 Cal.4th at 102-03. The Cisco agreement defers to the rules and
16 regulations of the American Arbitration Association ("AAA"). Thorne Decl., Exs. B, E. The court
17 finds that the AAA procedures conform to the five minimum requirements. As such, Cisco's AAED
18 meets the minimum requirements established for the type of claims waived here.

19 **D. Unconscionability**

20 Although Sheikh's FEHA claims pass the initial threshold established for unwaivable public
21 rights, the arbitration agreement as a whole must not be unconscionable. Sheikh, as the party
22 opposing arbitration, has the burden of proving the agreement is unconscionable. *Szetela v.*
23 *Discover Bank*, 97 Cal.App.4th 1094, 1099 (2002). Citing Cal. Evid. Code § 500; Cisco contends
24 that Sheikh, by failing to submit an opposing brief on the issue of unconscionability, did not meet
25 this burden. The court acknowledges that Sheikh waives any dispute as to matters of fact. With
26 respect to matters of law, however, the court may still find the contract unconscionable, and refuse
27 to enforce it or limit the contract's application. Cal. Civ. Code § 1670.5.

1 The California Supreme Court in *Armendariz* provides the definitive pronouncement of
2 California law on unconscionability to be applied to mandatory arbitration agreements. *Ferguson*,
3 298 F.3d 778,782-83 (9th Cir. 2002). "In order to render a contract unenforceable under the doctrine
4 of unconscionability, there must be both a procedural and substantive element of unconscionability."
5 *Id.* at 783 (citing *Armendariz*, 24 Cal.4th at 114). These two elements must both be present, but not
6 necessarily in the same degree. *Id.* "The more substantively oppressive the contract term, the less
7 evidence of procedural unconscionability is required to come to the conclusion that the term is
8 unenforceable, and vice versa." *Armendariz*, 24 Cal.4th at 114.

9 **1. Procedural Unconscionability**

10 "Procedural unconscionability concerns the manner in which the contract was negotiated and
11 the circumstances of the parties at the time." *Id.* at 783 (citing *Kinney v. United Healthcare Servs., Inc.*,
12 70 Cal. App. 4th 1322 (1999)). The analysis focuses on two factors: oppression and surprise.
13 *Id.* "'Oppression' arises from the inequality of bargaining power which results in no real negotiation
14 and an absence of meaningful choice. 'Surprise' involves the extent which the supposedly agreed-
15 upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to
16 enforce the disputed terms." *Id.* (citing *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519 (1997)).

17 Cisco concedes that the AAED is a contract of adhesion and thus is procedurally
18 unconscionable. Cisco contends, however, that the AAED's procedural unconscionability is
19 minimal and cites *Woodside Homes of Ca., Inc. v. Superior Court* as an analogous case. 107
20 Cal.App.4th 723 (2003). *Woodside* dealt with a real-estate contract requiring judicial reference. *Id.*
21 at 727. Because the signing party was required to initial each paragraph separately and both parties
22 were fairly sophisticated, the court found that the contract, though one of adhesion, was only
23 minimally procedurally unconscionable. *Id.* at 729-30. is no suggestion here that Sheikh's signing of
24 the AAED had any of the features the *Woodside* court relied upon in mitigating that contract's
25 procedural unconscionability.

26 Other cases analyze procedural unconscionability in employment arbitration disputes.
27 Where a contract of adhesion is oppressive, the element of surprise need not be shown. *Abramson*,
28 115 Cal. App. 4th 638, 656 (2004). Consistently, California courts have held an agreement is

1 procedurally unconscionable where "a party in a position of unequal bargaining power is presented
2 with an offending clause without the opportunity for meaningful negotiation." *Ferguson*, 298 F.3d
3 at 784. "Moreover, in the case of preemployment arbitration contracts, the economic pressure
4 exerted by employers on all but the most sought-after employees may be particularly acute, for the
5 arbitration agreement stands between the employee and necessary employment, and few employees
6 are in a position to refuse a job because of an arbitration requirement." *Armendariz*, 24 Cal.4th at
7 115.

8 *Gelow v. Cent. Pac. Morg. Corp.*, 560 F.Supp.2d 972 (E.D.Cal. 2008), also provides
9 guidance with respect to the level of procedural unconscionability present here. In *Gelow*, the
10 employer sought to enforce arbitration agreements allegedly signed by employees as part of their
11 employment. *Id.* at 976-77. There, the court held that the level of procedural unconscionability is
12 significant for an employee arbitration contract. *Id.* at 982. The court agrees. Given the acute
13 economic pressure exerted by employers requiring preemployment contracts, Cisco's AAED exhibits
14 more than a minimum level of procedural unconscionability.

15 **2. Substantive Unconscionability**

16 "Substantive unconscionability focuses on the terms of the agreement and whether those
17 terms are so one-sided as to shock the conscience." *Ferguson*, 298 F.3d at 784 (citing *Kinney*, 83
18 Cal.Rptr. 2d at 353). The primary consideration is whether the agreement contains a "modicum of
19 bilaterality." *Armendariz*, 24 Cal.4th at 117. A lack of mutuality exists in a contract of adhesion if it
20 requires one party, but not the other, to arbitrate all claims arising out of the same transactions or
21 occurrences. *Id.* at 120. If an arbitration system is fair, then both parties should be willing to submit
22 claims to arbitration. *Id.* at 118.

23 The court focuses its analysis on Cisco's intellectual property carve-out provision. The
24 AAED states that "claims concerning the validity, infringement or enforceability of any trade secret,
25 patent right, copyright, trademark, or any other intellectual property held or sought by the Company
26 or which the Company could otherwise seek" are exceptions to binding arbitration and will be
27 "resolved as required by law then in effect." Thorne Decl., Ex. B.

1 Cisco contends the AAED is bilateral because it does not condition arbitration on whether
2 the employee or Cisco is the party interested in filing suit. Defs Reply Mem. Concerning
3 Unconscionability at 6:22-26. Instead, the carve-out permits either party to file suit in court for any
4 claim relating to intellectual property held or sought by Cisco. Although at first glance the carve-out
5 seems one-sided, the provision grants both parties the right to judicial relief when either party
6 disputes rights to intellectual property. This alone, however, is not the test for mutuality.

7 The court must also consider whether the AAED compels arbitration of claims more likely to
8 be brought by the weaker party but exempts from arbitration claims more likely to be brought by the
9 stronger party. An agreement that allows for this discrepancy may be unfairly one-sided. *Fitz v.*
10 *NCR Corp.*, 118 Cal. App. 4th 702,724 (2004) (citing *Armendariz*, 24 Cal.4th at 119). In *Fitz*, a
11 former employee sued NCR for age discrimination. *Id.* at 707. In considering NCR's motion to
12 compel arbitration, the court found the company's employee-dispute resolution policy requiring
13 arbitration substantively unconscionable. *Id.* at 726. The court reasoned that in a wrongful
14 termination dispute, an employee claiming age discrimination is required to arbitrate her dispute
15 while the employer arguing the employee was fired for divulging trade secrets is permitted to seek
16 judicial review. *Id.* at 725. The agreement lacked basic fairness because it required one party but
17 not the other to arbitrate claims arising out of the same transaction or occurrence. *Id.* at 665-66.

18 As in *Fitz* and *Abramson*, Cisco's AAED is unfairly one-sided and lacks mutuality. The
19 AAED requires arbitration primarily for claims likely to be brought by the employee, the weaker
20 party. In contrast, the carve-out provision overwhelmingly benefits Cisco since an employer is far
21 more likely to initiate intellectual property suits. Here, Cisco is the stronger party, the one
22 responsible for creating the carve-out clause, and the one far more likely to initiate and benefit from
23 litigating an intellectual property dispute. As a result of its design, the AAED allows Cisco to
24 preserve judicial review for claims it is more likely to bring.

25 The court recognizes that not all contracts of adhesion that lack mutuality are invalid. The
26 *Armendariz* court concluded that contracts that lacked mutuality are enforceable but only when the
27 party with superior bargaining power factually establishes a "business reality" to justify the lack of
28 mutuality. 24 Cal.4th at 117. "Without reasonable justification for this lack of mutuality, arbitration

1 appears less a forum for neutral dispute resolution and more as a means of maximizing employer
2 advantage." *Id.* at 118. Here Cisco presents no evidence to justify a business reality. Accordingly,
3 the AAED is both procedurally and substantively unconscionable.

4 **F. Severance**

5 Since Cisco's AAED is both procedurally and substantively unconscionable, the court now
6 considers whether the offending provision can be severed and the remainder of the agreement
7 enforced, or whether the AAED should instead be found void in its entirety. If the contract is
8 permeated by unconscionability, then it cannot be enforced. *Armendariz*, 24 Cal.4th at 124.
9 Alternatively, if the offending terms are collateral to the contract's main purpose, then the illegal
10 provision can be restricted or severed. *Id.*

11 In *Armendariz*, the California Supreme Court chose not to sever the offending terms based on
12 two factors. *Id.* First, the arbitration agreement contained more than one unlawful provision. The
13 court reasoned that multiple defects indicate a systematic effort to impose arbitration on the
14 employee as an inferior forum to litigation. *Id.* Second, the court found the agreement permeated
15 with unconscionability since there was no single provision the court could strike out or restrict to
16 reform the contract. *Id.* Reforming the contract would instead require augmenting the contract with
17 additional terms, a solution the court does not have the authority to do. *Id.*

18 Here, the intellectual property carve-out is the sole unequal clause. The lack of additional
19 offending terms indicates that the AAED is not "permeated with illegality and unconscionability."
20 The AAED's purpose appears to be to submit employment disputes to arbitration, and the single
21 intellectual-property carve out, though it renders the agreement unconscionable under *Fitz*, can be
22 eliminated without undermining that purpose, or introducing other inequalities into the agreement.²
23 Therefore, the court finds that the intellectual property carve-out provision is appropriately severed
24 from the contract.

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28 ² Because the instant action does not involve an intellectual property dispute, the court does not
today pre-judge what this arbitration agreement would require in such a case.

III. ORDER

2 For the foregoing reasons, the court grants the defendant's motion to compel arbitration and
3 stays judicial action pending resolution of the arbitration.

6 || DATED: 03/31/09

Ronald M Whyte

RONALD M. WHYTE
United States District Judge

United States District Court

For the Northern District of California

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10 **Dated:** 03/31/09

11 JAS
12 Chambers of Judge Whyte